

1 AGREEMENT TO ACCEPT ARTWORK INSTALLATION

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5 **THIS AGREEMENT** (the “Agreement”), is dated as of the ____ day of _____,
6 2014, between the **CITY OF DURHAM**, a North Carolina municipal corporation, (the “City”),
7 and Renaissance Downtown Durham (the “Company” or “Contractor”), a nonprofit corporation
8 organized and existing under the laws of the State of North Carolina, hereinafter collectively
9 referred to as the “Parties”.

10
11 **NOW, THEREFORE**, for and in consideration of the mutual terms and conditions
12 hereinafter contained, and other good valuable consideration, the receipt and sufficiency all of
13 which are hereby acknowledged, the Parties agree as follows:

14
15 **1.0 BACKGROUND AND PURPOSE**

16
17 1.1 The Company has commissioned the Artist (defined below) to design and create
18 the ARTWORK (defined below).

19
20 1.2 The Company wishes to donate the ARTWORK to the City to be installed on City
21 owned property in the City Center District in the area generally known as the CCB Plaza (the
22 "CCB Plaza").

23
24 1.3 The City is desirous of accepting the installation and construction of the
25 ARTWORK on the City property as indicated subject to the terms of this Agreement.

26
27 1.4 The Parties desire to enter into an agreement to establish the procedures to be
28 followed for the design, installation and construction of the ARTWORK and establish the rights
29 and obligations of the parties with regard to the use, ownership, transfer and operation of the
30 ARTWORK.

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32 **2.0 DEFINITIONS**

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34 **2.1 Artist.** “Artist” means, collectively, Alvin Frega and Frega Creative Enterprises,
35 Inc.

36
37 **2.2 Certificate of Compliance.** Refers to the certificate referred to in NC. General
38 Statutes §160A-423.

39
40
41 **2.5 Artist Agreement.** “Artist Agreement” shall refer to the contract between the
42 Company and the Artist for the creation and installation of the ARTWORK.

43
44 **2.6 ARTWORK.** “ARTWORK” shall refer to the work of art consisting of a metal
45 chalice created by the Artist to be installed at the CCB Plaza as generally depicted in the graphic
46 form shown in Exhibit A.

47
48 **2.7 Notice to Proceed.** “Notice to Proceed” or “NTP” shall be the official
49 authorization from the City Manager or his designee allowing the Company and Artist to enter
50 onto the Public Property for the purpose of installing and construction of the ARTWORK.
51

52 **2.8 Public Property.** Refers to CCB Plaza, the City property where the ARTWORK
53 is to be installed and located.
54

55 **2.9 Term of Use.** “Term of Use” shall be twenty-five (25) years from the acceptance
56 by the City of the ARTWORK, during which term the City is obligated to maintain the
57 ARTWORK consistent with the terms of this Agreement.
58

59 **2.10 Work.** “Work” means all design, construction and installation services that the Artist is
60 required to perform pursuant to the Artist Agreement and all of the Company’s duties to the City that
61 arise out of this Agreement relating to the installation of the ARTWORK. Reference to the “Work” in
62 this Agreement may be the same whether or not capitalized.
63

64 **3.0 CONSTRUCTION AND INSTALLATION OF ARTWORK** 65

66 **3.1 Approved Plans and Specifications.** Prior to beginning the Work, the Company
67 shall present the appropriate City engineering and facility departments the detailed plans and
68 specifications to be used for the installation of the ARTWORK (the "Plans and Specifications").
69 The Plans and Specifications shall detail the base structure of the ARTWORK and connecting
70 mechanism(s) (“Base Structure”) to be used to permanently secure the ARTWORK to the City
71 Property, which Base Structure drawings and specifications shall be sealed by a NC licensed
72 Professional Engineer. A copy of the Plans and Specifications are attached hereto as Exhibit B.
73 The location of the ARTWORK (on the Public Property) and the manner in which it is to be
74 installed shall be mutually agreed to by the Company and the City, and generally located in the
75 area as identified in Exhibit C, “CCB Plaza with LocationK”. The Plans and Specifications shall
76 include all details regarding the design, dimensions, weight, materials used to create, plans to
77 install, and manner of attachment of, the ARTWORK (including appropriate drawings depicting
78 the ARTWORK) as envisioned by the Artist. After review and inspection of the Plans and
79 Specifications by the City, the Company shall acquire their approval by the City Manager or his
80 designee, which approval shall not be unreasonably withheld.
81

82 **3.2 City Right to Observe and Work Stoppage.** The Company shall require the
83 Artist to allow designated City representatives to visit the premises of the Artist where the
84 ARTWORK (prior to the installation) is being designed and constructed to observe the Artist
85 during the construction of the Artwork from time to time and/or inspect the ARTWORK prior to
86 installation. The Company shall coordinate with said City representatives to minimize potential
87 damage to the Public Property or other City property arising from the ARTWORK or the
88 installation thereof or to address safety concerns arising from the installation and existence of the
89 ARTWORK on the t Public Property. The City shall not be responsible for any of the Work;
90 however, the City Manager or his designee shall have the authority, in his reasonable discretion,
91 to stop installation of the ARTWORK at any time to protect against unacceptable damage to any
92 City property or potential injury to persons. Any alleged damage or injury to the Company or
93 the Artist due to such work stoppage shall not be compensable.

3.3 Indemnification by Artist. The Company shall ensure that the Artist shall indemnify, hold harmless, and defend the City to at least the same extent that the Artist agrees to indemnify, hold harmless, and defend the Company. The Company shall provide the City a copy of the Artist Agreement prior to execution and delivery of the Artist Agreement by the Company to verify the required indemnification provisions.

3.4 Notice to Proceed and Right of Entry. After the ARTWORK has been completed at the premises of the Artist, the Company shall submit a written request to commence the installation portion of the Work. Upon completion of the construction of the ARTWORK at the premises of the Artist, the Company shall provide the City with a certification from a NC licensed Professional Engineer that the ARTWORK has been constructed in conformance with applicable metal welding specifications and standards such that the ARTWORK can withstand sustained winds of at least 60 miles per hour without compromising the structure or integrity of the ARTWORK. The Artist shall allow city representatives to perform a final inspection of the ARTWORK at the Artist's premises before responding to the written request. Within 10-days of performing the final inspection, the City Manager or his designee shall either (1) deny the request to commence installation with a written explanation of the reasons for such denial (which shall only be related to (i) safety concerns, (ii) that the ARTWORK was not completed in accordance with the Plans and Specifications or (iii) other objections communicated in writing to the Artist and Company that have not been addressed by the Artist during the City's exercise of its observation rights pursuant to Section 3.2) or (2) issue a written notice to proceed (NTP) to the Company, which NTP shall constitute the authorization for the Company to enter into the Public Property for the purpose of installing the ARTWORK in accordance with the approved Plans and Specifications.

3.5 Assumption of all Costs, Expenses and Liabilities by Company. The Company shall assume all costs and expenses relating to the design, construction and installation of the ARTWORK. The Company shall obtain and provide, without cost to the City, all labor, materials, equipment, transportation, facilities, services, permits, and licenses necessary to perform the Work. The Company shall be responsible for repairing, replacing or re-constructing any damage to the Public Property caused by its activities relating to the Work, except as authorized by the approved plans and specifications. As the Company will be responsible for all work activities relating to the ARTWORK installation, the Company shall assume all risks and liabilities relating to such Work, except to the extent that any liability is caused by a negligent or wrongful act or omission of the City.

3.6 Signage. The Company shall be responsible, at its sole cost and expense, for installing signage or plaques describing the ARTWORK, the Artist and the reason for the creation and installation of the ARTWORK on the Public Property. All signage or plaques must be approved by the City in writing in its reasonable discretion.

3.7 Certificate of Compliance. The Company shall be responsible for obtaining all necessary permits and/or Certificate(s) of Compliance, if any, as required by law to allow the ARTWORK to be installed as envisioned by the Artist. The Company shall present to the City evidence of such permits and/or Certificate of Compliance, if any.

4.0 ACCEPTANCE AND MAINTENANCE BY CITY

4.1 Acceptance of ARTWORK. Upon installation of the ARTWORK in accordance with the Plans and Specifications, the City shall be granted, and through the City Manager, the City shall accept, full title and ownership of ARTWORK by means of a dated, written document in a form acceptable to the parties (such document the "Acceptance Instrument" and the execution and delivery of the Acceptance Instrument hereinafter "Acceptance"). If the installation of the ARTWORK was not properly completed in accordance with the Plans and Specifications, the City, through the City Manager, shall give written notice to the Company and the Artist specifying the basis for the City's objection to the installation. After the Company and Artist cure the deficiencies specified in the City's written notice, they shall give written notice of such cure to the City. If the City is satisfied, in its reasonable discretion, that the ARTWORK was properly installed, then the City shall execute and deliver the Acceptance Instrument to the Company. If the City is still not satisfied with the installation, the parties will continue the process of written objection and attempt to cure as described above until Acceptance. If the City fails to accept the ARTWORK within three (3) months after the initial installation, the City may require the Company to remove the ARTWORK from the Public Property and may terminate this Agreement by written notice to Company.

Prior to acceptance of the ARTWORK through execution and delivery of the Acceptance Instrument, the Company shall bear all risk of loss or damage to the ARTWORK. Upon the date of acceptance of the ARTWORK, and except as otherwise provided herein, the City shall be responsible for all liabilities, costs, and expenses resulting or arising out of owning, operating and maintaining the ARTWORK pursuant to the terms of this Agreement. The City agrees to maintain the ARTWORK in good condition during the entire Term of Use consistent with that of its initial condition. The City shall insure the ARTWORK consistent with the coverage the City would carry for all public works of art installed and maintained on City property, and the City shall provide, upon request from Company, evidence of such insurance. If the ARTWORK is damaged or destroyed by vandalism, fire, or casualty, then the City (at its cost and expense) shall promptly repair and/or replace the ARTWORK.

4.2 Term of Use of the ARTWORK. Except as otherwise provided in this Agreement, the City shall maintain the ARTWORK for not less than the Term of Use period. If the City chooses not to remove or disassemble the ARTWORK after the Term of Use, the City shall continue to maintain the ARTWORK consistent with the terms in effect during the Term of Use.

5.0 ALTERATION, RELOCATION OR REMOVAL

5.1 Alteration or Modification of the ARTWORK. The City shall not modify or alter the ARTWORK from its original plans and specification or location during the Term of Use, unless (1)(a) as required by law, (b) as necessary to not jeopardize federal or state funding for projects effecting the City's government functions, or (c) to address safety concerns, or (2) otherwise if given authorization from the Company. Any request for modification (other than as required by law or to address safety concerns) shall be made pursuant to the notice provisions of this Agreement. If the City receives no response from the Company within 30-days of evidence

of receipt of notice, the request to modify or alter the ARTWORK shall be deemed as accepted by the Company.

5.2 Removal of ARTWORK after Term of Use. At any time after the Term of Use, the City shall have the right to remove and/or disassemble the ARTWORK, in its entirety, from the Public Property at its own expense without authorization from the Company. Prior to exercising such right of removal and disassembly, the City shall first provide a 60-day advance notice to the Company of its intent to remove and/or disassemble the ARTWORK. If ownership transfer and title to the Company is requested by the Company, and to the extent it is reasonably feasible, the City shall perform any removal and/or disassembly of the ARTWORK with an effort to preserve as many of the components of the ARTWORK as practicable, and City shall formalize such transfer of said ownership and title by means of a dated, written document in a form acceptable to the parties. If requested by the Company, the City shall grant the right of the Company to perform the removal with its own forces subject to standard City review and approval. If requested by the Company, the City shall either deliver the ARTWORK components to a designated location within a 60 mile radius of the Public Property or temporarily store (not to exceed 90-days) the removed and disassembled ARTWORK components on City property for pick up by the Company. If no special request is made by the Company regarding the removal and disassembly of the ARTWORK, the City shall have the right to otherwise dispose or discard the ARTWORK and components in its discretion. The City shall not have the right to re-assemble the ARTWORK at another location without prior approval from the Company.

Notwithstanding the above, (1) if the Company fails to respond to the notice of the City within 60-days of receipt, the non-response shall be deemed as consent to allow the City to dispose or discard the ARTWORK components as the City determines, or (2) if the Company cannot be contacted through the notice provisions provide herein for failure of the Company to provide updated contact information, such failure to provide updated notice information shall be deemed as consent to allow the City to dispose or discard the ARTWORK components as the City determines.

6.0 EXCLUSIVE COPYRIGHT LICENSE

6.1 Warranty of Copyright License by Company. The Company represents and warrants to the City that it has commissioned the ARTWORK by the Artist to be designed, constructed and installed in the Public Property pursuant to the Artist Agreement. The Company further warrants that it has obtained from the Artist, pursuant to the Artist Agreement, all rights under copyright in the ARTWORK including rights to create derivative works of the ARTWORK, as provided in the Artist Agreement.

6.2 Copyright License for Derivative Works. By and through the execution of this Agreement, but subject to Acceptance, the Company hereby transfers and assigns to the City until removal and/or disassembly of the ARTWORK as provided in Section 5.2, a perpetual, royalty-free, fully paid, exclusive license to use, display, exhibit, promote, advertise, make and distribute copies of, photograph, video, and otherwise reproduce two and three dimensional images of the ARTWORK for non-commercial and commercial purposes, in whole or in part,

and to incorporate the image of the ARTWORK, in whole or in part, into other works (the “Derivative Works”) for the City’s use under its statutory corporate authority. All right, title and interest in the Derivative Works shall remain with the City.

6.3 License Authorizing Removal of ARTWORK. The Company further grants a perpetual, exclusive license to the City, or otherwise waives any objection under copyright, arising from the removal and disassembly of the ARTWORK pursuant to Section 5 above.

7.0 WAIVER BY ARTIST RIGHTS UNDER VARA IN ARTWORK.

The Company has obtained from the Artist a waiver of his rights to the ARTWORK consistent with the terms of this Agreement under the Visual Artists Rights Act of 1990 (17 U.S.C. § 106A (2008)) (“VARA”) in a form acceptable to the City. Pursuant to the Artist Agreement, if any material alteration or damage to the ARTWORK occurs or if the rights granted herein to the City, with respect to modifications, alterations, disassembly, removal or destruction pertaining to the foregoing, are not exercised in a tasteful and professional manner, (i) the Artist has the right to notify the Company that he disclaims authorship of the ARTWORK, (ii) upon written request to the Company, and then upon notification by the Company to the City, the City shall remove, or allow the Company to remove, the identification plaque and all attributive references to the Artist within 30 days of receipt of the notice, and (iii) the Artist may take such other action as the Artist may choose in order to disavow the ARTWORK as his work. It is understood and agreed that, pursuant to the Artist Agreement, and the terms and provisions of this Agreement, the City has the requisite authority to remove and disassemble the ARTWORK, if the City chooses to exercise its rights to do so as provided in this Agreement.

8.0 NOTICES, CHANGE OF NOTICE INFORMATION

8.1 All notices, documentation and other communications required or permitted by this Agreement shall be in writing and shall be given either by personal delivery or certified United States Mail, return receipt requested, addressed as follows:

To the City:

[OEWD NEEDS TO FILL OUT]

To the Company:

Renaissance Downtown Durham
c/o Downtown Durham, Inc.
115 Market Street, Suite 213
Durham, North Carolina 27701

Attn: President

To the Artist:

Frega Creative Enterprises, Inc.
[NEED ADDRESS]

Attn: Alvin Frega

8.2 A change of address or person to receive notice may be made by either party by notice given to the other party. It shall be the sole responsibility of each individual party to provide accurate, updated notice information. Any notice or other communication under this Agreement shall be deemed given at the time of actual delivery, if it is personally delivered or sent by fax. If the notice or other communication is sent by United States mail, it shall be deemed given upon the third calendar day following the day on which such notice or other communication is deposited with the United States Postal Service or upon actual delivery, whichever first occurs.

9.0 EXHIBITS

The following exhibits are made a part of this contract:

- | | |
|-----------|--|
| Exhibit A | “Depiction of ARTWORK,” consisting of ____ pages. |
| Exhibit B | ”Plans and Specifications,” consisting of ____ page; |
| Exhibit C | “CCB Plaza with Location,” consisting of ____ page. |

In case of conflict between an exhibit and the text of this Agreement excluding the exhibit, the text of this Agreement shall control.

10.0 INSURANCE

The Company shall maintain insurance not less than the following:

- I. Commercial General Liability, covering
 - a. Premises/Operations
 - b. Products Completed Operations
 - c. Broad form Property Damage
 - d. Contractual Liability
 - e. Independent Contractors (if used in the performance of this agreement)
 - f. City of Durham must be named an additional insured, and an original of the endorsement to effect the coverage must be attached to the certificate.

- (if by blanket endorsement, then agent may so indicate in the GL section of the certificate, in lieu of an original endorsement)
- g. Combined single limits not less than \$1,000,000 per occurrence.
- II. Property Coverage, covering
- a. Fine Arts in any one occurrence up to \$1,000,000.
- b. Property in Transit in any one occurrence up to \$1,000,000
- III. All insurance shall be provided by companies authorized to do business in the State of North Carolina with a best rating of A-VIII or better.
- IV. Insurance shall be evidenced by a certificate:
- a. Providing notice to the City of not less than 30 days prior to cancellation or reduction of coverage.
- b. Certificates of Insurance shall be addressed to:
- City of Durham
Attn: Risk Manager
101 City Hall Plaza (Annex)
Durham, NC 27701

11.0 INDEMNIFICATION

11.1 Definitions. In this Section 11.0, the following definitions shall apply: “Claims” are claims, losses, damages, liabilities, fines, penalties, fees, royalties, costs, demands, actions, suits, and judgments of any kind or nature whatsoever, whether at law or in equity, including court costs and reasonable attorney’s fees assessed as part of any of said items. “Persons Connected with Company” are Company’s officers, members, managers, board members, employees, agents, contractors, subcontractors of all tiers, and invitees, but excluding the City.

11.2 Indemnification by Company. “City Indemnitees” are defined as City, its officers, officials, employees, agents, and independent contractors, but excluding Company. Company shall indemnify, defend, and hold harmless the City Indemnitees from and against all Claims arising out of, relating to, or resulting from acts or omissions by Company or Persons Connected with Company occurring prior to Acceptance arising out of, relating to, or resulting from the Company’s obligations with respect to this Agreement. Without limiting the preceding sentence, and as an additional obligation of Company, it is agreed that Company shall indemnify, defend, and hold harmless the City Indemnitees from and against all Claims made by independent contractors, including subcontractors of all tiers, where the independent contractor was engaged by Company to perform work pursuant to this Agreement, except to the extent the Claim is the result of a negligent or wrongful act or omission by any of the City Indemnitees. In performing its duties under this Section 11.2, Company shall defend City Indemnitees with legal counsel reasonably acceptable to City.

11.3 Survival. This Section 11.0 shall remain in force despite termination of this Agreement with respect to acts and omissions occurring before termination of this Agreement

(whether by expiration of the term or otherwise) and termination of the services of Company under this Agreement.

12.0 MISCELLANEOUS PROVISIONS

12.1 City Policy. THE CITY OPPOSES DISCRIMINATION ON THE BASIS OF RACE AND SEX AND URGES ALL OF ITS CONTRACTORS TO PROVIDE A FAIR OPPORTUNITY FOR MINORITIES AND WOMEN TO PARTICIPATE IN THEIR WORK FORCE AND AS SUBCONTRACTORS AND VENDORS UNDER CITY CONTRACTS.

12.2 Choice of Law and Forum. This Agreement shall be deemed made in Durham County, North Carolina. This Agreement shall be governed by and construed in accordance with the laws of the State of North Carolina. The exclusive forum and venue for all actions arising out of this Agreement shall be the North Carolina General Court of Justice in Durham County. Such actions shall neither be commenced nor removed to federal court. This section shall not apply to subsequent actions to enforce a judgment entered in actions heard pursuant to this section.

12.3 Principles of Interpretation and Definitions. In this Agreement, unless the context requires otherwise (a) the singular includes the plural and the plural the singular. The pronouns “it” and “its” include the masculine and feminine. References to statutes or regulations include all statutory or regulatory provisions consolidating, amending, or replacing the statute or regulation. References to contracts and agreements shall be deemed to include all amendments to them. The words “include,” “including,” etc. mean include, including, etc. without limitation; (b) references to a “Section” or “section” shall mean a section of this Agreement; (c) “Contract” and “Agreement,” whether or not capitalized, refer to this instrument; (d) titles of sections, paragraphs, and articles are for convenience only, and shall not be construed to affect the meaning of this Agreement; (e) “Duties” includes obligations; (f) the word “person” includes natural persona, firms, companies, associations, partnerships, trusts, corporations, governmental agencies and units, and other legal entities; (g) the word “shall” is mandatory; and (h) the word “day” means calendar day.

12.4 Waiver. No action or failure to act by either party hereto shall constitute a waiver of any of its rights or remedies that arise out of this Agreement, nor shall such action or failure to act constitute approval of or acquiescence in a breach thereunder, except as may be specifically agreed in writing.

12.5 Performance of Government Functions. Nothing contained in this Agreement shall be deemed or construed so as to in any way estop, limit, or impair the City from exercising or performing any regulatory, policing legislative, governmental, or other powers or functions.

12.6 Severability. If any provision of this Agreement shall be unenforceable, the remainder of this Agreement shall be enforceable to the extent permitted by law.

12.7 Assignment. Successors and Assigns. Without the City's written consent, the Company shall not assign (which includes to delegate) any of its rights (including the right to

payment) or duties that arise out of this contract. The City Manager may consent to an assignment without action by the City Council. Unless the City otherwise agrees in writing, the Company and all assignees shall be subject to all of the City's defenses and shall be liable for all of the Company's duties that arise out of this Agreement and all of the City's claims that arise out of this contract. Without granting the Company the right to assign, it is agreed that the duties of the Company that arise out of this Agreement shall be binding upon it and its heirs, personal representatives, successors, and assigns.

12.8 Compliance with Law. In performing all of the Work, the Company shall comply with all applicable law. The City shall also comply with all applicable laws in fulfilling its obligations under the Agreement

12.9 No Third Party Rights Created. This Agreement is intended for the benefit of the City and the Company and not any other person.

12.10 Modifications; Entire Contract. A modification of this Agreement is not valid unless signed by both parties and otherwise in accordance with requirements of law. Further, a modification is not enforceable against the City unless the City manager or a Deputy or Assistant City Manager signs it for the City. This Agreement contains the entire agreement between the parties pertaining to the subject matter of this Agreement. With respect to that subject matter, there are no promises, contracts, conditions, inducements, warranties, or understandings, written or oral, expressed or implied, between the parties, other than as set forth or referenced in this Agreement.

12.11 City's Manager's Authority. To the extent, if any, the City has the power to exercise the City's rights and remedies under this Agreement that power may be exercised by the City Manager or a Deputy or Assistant City Manager without City Council action.

12.12 E-Verify Compliance. The contractor represents and covenants that the contractor and its subcontractors comply with the requirements of Article 2 of Chapter 64 of the North Carolina General Statutes (NCGS). In this E-Verify Compliance section, "contractor," "its subcontractors," and "comply" shall have the meanings intended by NCGS 160A-20.1(b). The City is relying on this section in entering into this contract. The parties agree to this section only to the extent authorized by law. If this section is held to be unenforceable or invalid in whole or in part, it shall be deemed amended to the extent necessary to make this contract comply with NCGS 160A-20.1(b).

IN WITNESS WHEREOF, the City and the Company have caused this Agreement to be executed under seal themselves or by their respective duly authorized agents or officers.

City:

CITY OF DURHAM

By: _____

preaudit certificate, if necessary:

Company:

By _____ (Affix corporate seal)

Acknowledgement by Company:

STATE OF NORTH CAROLINA

COUNTY OF _____

I, a notary public in and for the aforesaid county and state, certify that _____ personally appeared before me this day and stated that he is President of Renaissance Downtown Durham, a North Carolina nonprofit corporation, and that by authority duly given and as the act of the corporation, he signed the foregoing agreement with the City of Durham and the corporate seal was affixed thereto.

This the _____ day of _____, 2014.

Notary Public

Print or Type name
of Notary Public: _____

(NOTARIAL SEAL)